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Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600

14 August 2020

Dear Committee Secretary

Submission to JSCOT on Certain Aspects of the Treaty-making Process in Australia

1. Introduction

Clifford Chance is pleased to make this submission to the Joint Standing Committee on Treaties (**JSCOT** or **Committee**) in relation to its inquiry into Certain Aspects of the Treaty-Making Process in Australia. Clifford Chance is a global law firm with recognised expertise in investor-State dispute settlement (**ISDS**) and public international law. In this submission, we focus on the following terms of reference specified by the Committee:

- the role of JSCOT in respect of trade-related agreements, including during the negotiation phase;
- the consultation process undertaken by the Department of Foreign Affairs and Trade (**DFAT**) before and during the negotiation of trade agreements; and
- the effectiveness of independent analysis to inform negotiation or consideration of trade agreements.

2. Our expertise and experience acting for Australian investors

Clifford Chance has the largest ISDS team in the Asia-Pacific region and the only dedicated ISDS practice in Australia. ISDS specialists from our Perth and Sydney offices regularly represent Australian investors in claims under Bilateral Investment Treaties (**BITs**) and Free Trade Agreements (**FTAs**), including investor-state arbitrations at the International Centre for the Settlement of Investment Disputes (**ICSID**) and under *ad hoc* arrangements. These ISDS processes cover a range of sectors, including mining, oil and gas, power, construction, and transportation.

Our Perth and Sydney offices have represented investors in the following ISDS cases brought under Australian BITs and FTAs:

- *Tantalum International Ltd v Arab Republic of Egypt* (ICSID Case No. ARB/18/22) – this case, which is brought under the Australia-Egypt BIT, concerns the alleged expropriation of the Abu Dabbab tantalum and tin mine in the Eastern Desert in Egypt;
- *Kingsgate Consolidated Limited v Kingdom of Thailand* (PCA Case No. 2017 36/AA684) – this case, which is brought under the Australia-Thailand FTA, concerns the alleged expropriation of the Chatree gold and silver mine in northern Thailand; and
- *Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No. ARB/12/40) – this was a case brought under the Australia-Indonesia BIT, concerning the alleged expropriation of the East Kutai Coal Project in East Kalimantan.

Outside of Australia's BIT/FTA program, our Perth and Sydney offices have represented investors in many other ISDS cases, including:

- *Cortec Mining Kenya Ltd v Republic of Kenya* (ICSID Case No. ARB/15/29) – this case, which is brought under the UK-Kenya BIT, concerns the alleged expropriation of the Mrima Hill rare earths and niobium mining project in south-eastern Kenya;
- *Oleovest Pte Ltd v Republic of Indonesia* (ICSID No. ARB/16/26) – this was a case brought under the Singapore-Indonesia BIT, concerning the alleged expropriation of certain investments in the palm oil sector; and
- *Churchill Mining Plc v Republic of Indonesia* (ICSID Case No. ARB/12/14) – this was a case brought under the UK-Indonesia BIT, concerning the alleged expropriation of the East Kutai Coal Project in East Kalimantan.

In addition to the matters above, our Australian ISDS specialists regularly work on BIT and FTA cases with other Clifford Chance offices around the world. There is, therefore, a truly global perspective.

3. The use of domestic explanatory materials in investment treaty arbitrations

Domestic explanatory materials, such as parliamentary reports, explanatory notes and transcripts of domestic treaty-making proceedings such as JSCOT hearings are increasingly being relied upon by claimant investors in investor-State arbitration proceedings. As private businesses are almost never privy to the negotiation records of the treaty, these explanatory materials often represent the only publicly available contemporaneous materials that claimant investors can rely upon to prove the meaning or underlying intent of a treaty provision.

In terms of legal framework, the Vienna Convention on the Law of Treaties (**VCLT**) provides that domestic explanatory materials, may be relied on in the interpretation of a treaty.

Articles 31 and 32 of the VCLT provide as follows:

"*Article 31 General rule of interpretation*

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. *There shall be taken into account, together with the context:*

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. *A special meaning shall be given to a term if it is established that the parties so intended.*

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."[1]

[1] Vienna Convention on the Law of Treaties, signed 23 May 1969, United Nations Treaty Series, vol. 1155 (entry into force 27 January 1980), Articles 31 and 32.

Under the VCLT, there is scope for the use of JSCOT materials to assist in the interpretation of Australian investment treaties before international tribunals. This is confirmed by the following cases, where international tribunals referred to domestic explanatory materials in deciding points of contested treaty interpretation:

- *Aguas del Tanariv. Republic of Bolivia*[2] - in this case, Bolivia objected to the jurisdiction of the ICSID tribunal on two grounds: (i) that the Netherlands-Bolivia BIT did not contain Bolivia's advance consent to ICSID arbitration; and (ii) the investor does not meet the definition of "*investor*" in the Netherlands-Bolivia BIT. The tribunal was referred to an Explanatory Note prepared after the negotiation of the Netherlands-Bolivia BIT that was submitted to the Dutch Parliament in relation to the domestic approval process of the Netherlands-Bolivia BIT. The tribunal considered that it was permitted to refer to the Note as part of the tribunal's "*Article 32 analysis*" to confirm the tribunal's interpretation of the disputed phrase.[3]

- *HICEE B.V. v The Slovak Republic*[4] - in this case, Slovakia objected to jurisdiction on the basis that the Netherlands-Czech and Slovak BIT excluded certain assets held by the claimant investor's subsidiaries from protection under the BIT. The tribunal had recourse to an Explanatory Note submitted to the Dutch Parliament in the process of the Dutch domestic approval of the Netherlands-Czech and Slovak BIT and found (by majority) that the Explanatory Note was *determinative* for the interpretative question before the investment tribunal.[5]

- *Generation Ukraine, Inc. v Ukraine*[6] - in this case, Ukraine objected to the jurisdiction of the tribunal under the United States-Ukraine BIT. The claimant investor produced to the tribunal a "*Letter of Submittal*" that contained the United States' understanding of the scope of the term "*investment*" which was a matter of dispute in the arbitration. In response, Ukraine submitted that the domestic explanatory materials produced by the claimant investor "*should not be regarded as necessarily reflecting the official interpretation given to the BIT by Ukraine*".[7] The tribunal noted that Ukraine's reservation was "*fair and understandable*", however the tribunal expressly noted that "[Ukraine] *did not tender any*

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2 *Aguasdel Tanariv. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 December 2005. Accessible at https://www.italaw.com/sites/default/files/case-documents/italaw10957_0.pdf

3 Ibid, para. 266.

4 *HICEE B.V. v The Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award of 23 May 2011. Accessible at https://www.italaw.com/sites/default/files/case-documents/ita0404_0.pdf

5 Ibid, paras. 122-147.

6 *Generation Ukraine, Inc.v Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003. Accessible at https://www.italaw.com/sites/default/files/case-documents/ita0358.pdf

7 Ibid, para. 15.4.

documents emanating from official Ukrainian sources".[8] The tribunal went on to confirm that the explanatory materials *"unequivocally supports the Claimant's position*" and that due to the "*absence of any competing considerations advanced by* [Ukraine]"[9] the tribunal was satisfied that the claimant investor's interpretation of the United States-Ukraine BIT was correct.

As these and other ISDS cases demonstrate, there is an increasing trend of investors relying upon domestic explanatory materials in the interpretation of investment treaties. As full-time practitioners of ISDS, we can say that Australian investors will rely more and more on JSCOT hearing transcripts (and evidence given by DFAT legal officers at JSCOT hearings) to prove the meaning and intent of treaty provisions, including those relating to the jurisdiction of arbitral tribunals.

In light of this trend, we respectfully submit that, in the review of JSCOT processes, due regard should be had to the practical, sometimes critical, role that JSCOT hearing transcripts (and related documents) play in ISDS cases involving Australian investors.

In our view, to ensure that the right questions are asked at JSCOT hearings (and the clearest record of Australia's intentions are produced), and to ensure proper scrutiny of the actions of the Executive in the negotiation of treaties, consideration should be given to the introduction of a mechanism or practice whereby JSCOT may obtain the assistance of independent legal counsel in hearings concerning Australian trade and investment treaties.

4. The role of JSCOT when considering international investment treaties

We note that numerous Committees have raised concerns around the transparency of Australian treaty negotiations.[10] In the most recent 2015 Senate Committee Report into Australia's treaty-making process it was noted that "[l]*ack of access to information about confidential negotiations, and the impact of such a lack of information on the quality of stakeholder consultation, was of concern to the majority of submitters."*[11]

Despite these well held concerns, it is our view that Australia's treaty negotiation process should remain confidential. Very few States have domestic treaty making processes that require draft treaty texts to be released for public consultation prior to signature – almost all nations follow the same approach as Australia, i.e. treaty negotiations are conducted on a confidential

8 Ibid.

9 Ibid, paras. 15.6 and 15.7.

10 Senate Foreign Affairs, Defence and Trade References Committee (2003) *Report: Voting on Trade,* Canberra; Joint Standing Committee on Treaties (2012b*) Report on the Inquiry into the Treaties Ratification Bill 2012,* Canberra; and Senate Foreign Affairs, Defence and Trade References Committee (2015) *Blind Agreement: Report on the Commonwealth's treaty-making process.*

11 Senate Foreign Affairs, Defence and Trade References Committee (2015) *Blind Agreement: Report on the Commonwealth's treaty-making process*, p. 56.

basis. As explained by Ms. Holmes, Assistant Secretary at DFAT, should the Executive be required to make its treaty negotiations available to the public this could impede on the Executive's treaty negotiation strategy and bargaining position in respect of the treaty being negotiated and future Australian treaties.

However, we acknowledge there is a need to balance the interests of the Commonwealth with community expectations of democratic accountability. JSCOT, as the only parliamentary body holding the Executive to account in respect of treaty-making activities, should be vested with the necessary powers during its review to obtain independent specialist legal advice on issues arising out of the treaty text presented by the Executive. In circumstances where members of the Committee may not have the specialist expertise required to consider the terms of the treaty or assess their potential long-term effect, this approach will significantly enhance the depth and quality of the inquiry.

In this regard, we note there are many examples where independent specialist legal advice is obtained to assist inquiries or committees in obtaining evidence and issuing recommendations, the obvious example being counsel assisting royal commissions, parliamentary inquests and inquiries.[12] The NSW Bar Association has described "*the appointment and role of counsel assisting a commission of inquiry is central to the inquiry process*".[13]

Separately, we also consider that it may be appropriate for JSCOT (and counsel assisting JSCOT) to review draft treaty text (on a confidential basis) during negotiation, so that any necessary amendments to the the text of treaty can be made prior to the signing of the treaty.

5. DFAT Consultation Process

As discussed above, the 2015 Committee Report identified that the confidential nature of the treaty negotiation process has created a lack of public trust.[14] We note DFAT's website encourages interested people and organisations to make submissions on FTA's under negotiation and we are aware that DFAT has held and conducted stakeholder briefing sessions in the past.[15] However, this consultation process lacks transparency and DFAT is under no obligation to actually engage with interested stakeholders.

To make the consultation process more transparent and accessible to stakeholders, we consider that DFAT may wish to establish a set of publicly available guidelines which set out the criteria that need to be met for an interested party to engage in the confidential DFAT consultation

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[12] See, Justice P M Hall, 'The role of counsel assisting in commissions of inquiry', *NSW Bar Association*, http://www.austlii.edu.au/au/journals/NSWBarAssocNews/2005/14.pdf

[13] Ibid.

[14] Senate Foreign Affairs, Defence and Trade References Committee (2015) *Blind Agreement: Report on the Commonwealth's treaty-making process*, p. 57.

[15] Senate Foreign Affairs, Defence and Trade References Committee (2015) *Blind Agreement: Report on the Commonwealth's treaty-making process*, p. 56.

process. We consider that, in certain circumstances (such as where an Australian business has a major investment in the country with which the treaty is being negotiated), it should be possible for stakeholders to view relevant parts of the negotiation text, or at least be briefed on the effect of the text proposed. This exceptional engagement mechanism could include a requirement that the stakeholder sign a Confidentiality or Non-Disclosure Agreement.

Presently, it is unknown how many stakeholders DFAT actively engages with in the treaty negotiation process, or what principles DFAT officers apply in determining whether a given stakeholder should be consulted in this context. It is conceivable that, through a lack of clarity in the process, DFAT is missing opportunities to get valuable, business-level feedback from stakeholders on treaty provisions under negotiation.

As we will discuss in greater detail below, we also consider that there is considerable merit in the adoption of a mechanism or practice whereby the Executive, notably DFAT, may engage independent legal services (outside of the Australian Government Solicitor or the Attorney-General's Department), such as from law firms with international expertise in the negotiation of treaties and representation of parties' disputes under treaties.

We are aware that the *Legal Services Directions* (Cth) provide that "*advice on treaty negotiation*" is considered "*tied work*"[16] and therefore, unless an exemption is granted, legal advice on treaty negotiation can only be given by the Australian Government Solicitor, the Attorney-General's Department and DFAT.

While we are the first to acknowledge the expertise of the Australian Government Solicitor, the Attorney-General's Department and DFAT, we respectfully submit that, with the assistance of external law firms skilled in treaty negotiation and enforcement, the quality of the overall legal analysis would be materially increased, if only because it would guarantee a practical view of the treaty text is available.

6. Considering the Effectiveness of Independent Analysis

Similar to the Australian Parliament, the Parliament of the United Kingdom does not have the power to amend a treaty once it has been concluded and opened for signature or ratification.[17] However, to ensure the best independent legal advice and analysis is received during the negotiation phase, the United Kingdom Department of International Trade regularly seeks the services of international law firms to support the Department's negotiation of investment treaties, including future trade agreements.[18]

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16 *Legal Services Directions 2017* (Cth) Sections 2(c) and 3A.

17 House of Commons, Parliament's role in ratifying treaties, Briefing Paper No. 5855, 17 February 2017, p. 22.

18 See, for example, Department for International Trade UK, US Trade Legal Support Awarded Opportunity; Department for International Trade UK, US Trade Legal Support Awarded Opportunity.

For example, in the United Kingdom's recent trade negotiations with the United States of America, the Department of International Trade sought legal advice on matters involving United States law and legal structures relating to FTAs and will cover areas such as goods, agriculture, temporary entry, financial services, customs administration and trade facilitation. Similarly, the United Kingdom has issued public tenders for legal advice and support in connection with the negotiation of FTAs with Australia, New Zealand and the European Union.

The approach of the United Kingdom reflects the growing need for independent legal advice, in addition to in-house government lawyers, in the FTA negotiation process. With the greatest respect, the in-house lawyers at the Australian Government Solicitor, the Attorney-General's Department and DFAT do not have (and nor could they be expected to have) all of the legal expertise required to conduct treaty negotiations to the level expected by the Australian public, particularly in the case of multi-chapter/multi-disciplinary FTAs.

We would respectfully encourage the Executive to consider adopting the approach in the United Kingdom and engage external lawyers (in conjunction with in-house government lawyers) to obtain independent analysis and assistance in the negotiation of Australian trade and investment treaties, to ensure that the very best outcome is achieved for the Commonwealth.

Yours faithfully

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